Sealaska CORPORATION

December 13, 2001

Mr. Randy Bates
Regulation Revision Project Leader
Division of Governmental Coordination
Office of the Governor
P.O. Box 110030
Juneau, Alaska 99811-0030

Re: Sealaska Corporation Comments on Second Public Notice Draft of Proposed Coastal Consistency Review Process Regulations

Dear Mr. Bates:

Sealaska Corporation appreciates the opportunity to comment on the October 1, 2001 draft of the Division's proposed amendments to its coastal management consistency review process regulations (6 AAC 50) (the "October Draft"). In several important respects, the October Draft is responsive to the concerns raised by the private sector over previous drafts, including:

- limitation of ACMP review to permits on the so-called "C List." This will provide some element of predictability with respect to the coverage of the ACMP program;
- clarification that only one consistency determination is rendered for each project, though we are suggesting that further work ought to be done in this regard (*see below*);
- removing overbroad language regarding a coastal district's expertise in "applying" its coastal management plan;
- deleting language in proposed 6 AAC 50.025 that could have unlawfully extended consistency review to ancillary and related activities that do not require a state permit;

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- clarifying that the coordinating agency remains responsible for issuing the decision after a director or commissioner-level elevation (though, again, Sealaska believes that additional changes are still necessary [*see below*]);

- clarifying that generally-permitted activities will always be excluded from the scope of any subsequent consistency review of related aspects of the project ;

- limiting resource agencies' ability to address coastal management issues in the context of hearing permit appeals, when that resource agency is not the coordinating agency; and

- clarifying that: (i) mere expiration of a permit, without a modification of the project itself, does not trigger a consistency review; and (ii) if a project is modified at the time of renewal, only the modification, and not the underlying project, will be subject to a consistency review.

Sealaska's remaining areas of concern are substantive, and their resolution will greatly influence the ultimate impact of this rulemaking exercise on the private sector. As we've stressed in the past, these are the most important procedural regulations in Alaska; they are complex; and every turn is fraught with the possibility of costly unintended consequences. Sealaska hopes that DGC's response to these remaining concerns will be deliberate; will continue to be the product of an open give-and-take with the private sector; and will reflect the judgment and experience of agency personnel with substantial, on-the-ground permitting experience, as well agency policymakers.

Most of our remaining suggestions are best expressed topically. These include:

Filtering Projects that are Subject to Consistency Review

The draft regulations provide that every activity requiring a permit on the "C List" will be subject to consistency review. *6 AAC 50.025(b)(1); 6 AAC 50.210(a).* [1]/ Unfortunately, the C List captures activities that sometimes do not have material impacts on the coastal area. By itself, then, the C List provides an insufficient filter to weed out inconsequential activities from the consistency review process.

Accordingly, *6 AAC 50.005, 6 AAC 50.025, 6 AAC 50.200 and 6 AAC 50.210(a)* should all provide that an activity is subject to consistency review only if: (i) the activity requires a permit on the C List; *and* (ii) the activity will have a direct and significant impact on coastal waters (*see below*).

In this regard, there is an inadvertent drafting problem in *6 AAC 50.025.* The section is intended to provide an exclusive list of activities subject to consistency review. To achieve result, we recommend that §025(b) be amended to read:

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[1] / All citations are to the October Draft, unless otherwise specified.

(b) Except as provided under AS 46.40.094 and 6 AAC 50.700, the scope of the project subject to consistency review ~~must~~ will only include...

Confining Review to Activities with a "Direct and Significant" Coastal Impact

DGC still proposes to require consistency reviews for activities that either "may affect" (*6 AAC 50.005*) or "may have reasonably foreseeable direct or indirect effects" on coastal resources. *6 AAC 50.750(a)*. The only basis for this expansive wording is a federal law that defines the circumstances under which Congress has agreed to allow state review of federal activities.

The issue, however, is not the extent of Congress' authorization of review of federal activities; rather, the relevant question is whether the Alaska State Legislature has authorized DGC and the Coastal Policy Council to review so sweeping a universe of private coastal projects for state law purposes. And, phrases like "reasonably foreseeable indirect effects" and "may affect" are found nowhere in the ACMP's governing statutes. To the contrary: in enacting the ACMP, the Alaska Legislature declared that its intent was to "develop a management program which sets out...standards...to guide and resolve conflicts involving the use of resources which have a *direct and significant impact* upon the coastal land and water of the state." [2]/

In these times of declining state revenues, it is not good government for the Office of the Governor to volunteer to perform costly bureaucratic reviews of small projects that will only have minor and occasionally esoteric "effects" on some coastal resource. Certainly, the Alaska Legislature, focused as it was on "direct and significant impacts," has never imposed upon DGC, or the Council, any such obligation.

In our view, the "direct and significant" modifier must be inserted in at least the following sections:

- *6 AAC 50.005(a)*
- *6 AAC 50.045(b)*
- *6 AAC 50.305* (delete the vague, open-ended "initiates an event or series of events" language)
- *6 AAC 50.750*
- *6 AAC 50.810(b).* [3]/

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[2] / Sec. 2(3), ch. 84, SI.A 1977; *see also* AS 46.40.096(g)(1) (coastal district only entitled to party-level participation in consistency review process if the project will have a "direct and significant impact" on that district).

[3] / Section 810 is the "project modification" section, and the "direct and significant" modifier is especially important here. Projects will often need to be modified during the course of

Moreover, the phrase "direct and significant impact" is defined in AS 46.40.210(7) with reference to impacts on the coastal area, rather to the more ambiguous (and seemingly open-ended) phrase "coastal use or resource." Therefore, Sealaska recommends that a new definition be added to §990 to read:

> *( ) "direct and significant impact" has the same meaning as in AS 46.40.990(7).*

and that, wherever it appears, the phrase in the body of the regulations only read "direct and significant impact," without the "use or resource" modifier. [4]/

Sealaska respectfully submits that these changes are statutorily required. If, however, DGC declines to incorporate these amendments, we would recommend that:

- whenever the phrase "may affect" appears as a threshold for consistency review (such as in *6 AAC 50.005(a), 6 AAC 50.055(b)* and *6 AAC 50.810(b)*), that phrase be replaced with "will have reasonably foreseeable impacts" on the coastal area;

- the current definition of "reasonably foreseeable" in *6 AAC 50.990(38)*, which Sealaska believes has neither apparent meaning nor precedent to guide its interpretation, should be replaced with "is more likely than not to occur." This is a nearly-universally recognized legal standard of probability. It has interpretive precedent behind it, and it is a concept that anyone can understand; and

- section 810 be amended to provide that, in the absence of "direct and significant" impacts from a project modification, the modification will be reviewed for consistency in:

  the shortest feasible time, not to exceed 10 days, taking into consideration the anticipated effect of the project on the coastal area, any applicable state or federal notice requirements, and time constraints.

  In this regard, it is important to note that nothing in any statute requires a 30 or 50 day review period; and, the suggested language tracks AS 46.35.096(c) in articulating the relevant factors that DGC

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construction in order to respond to unanticipated field conditions. Bringing a project to a prolonged halt during a short construction season in order to respond to an esoteric or insignificant change in project impacts is unwarranted as a matter of policy, and certainly not required a matter of law.

[4] / The parallel federal provision, we would note, is even narrower. It extends the "coastal zone" inland only so far as is necessary to control impacts on activities that may have a "direct and significant impact on the coastal <u>waters</u>..." 16 U.S.C. §1453(1); 15 C.F.R. §923.31(a)(1).

should consider in setting the review deadline for project modifications.

Clarifying that Only One Consistency Determination is Rendered Per Project

Sealaska appreciates the amendment that DGC has made to *6 AAC 50.005(d)* to clarify this issue. However, the fact remains that the outdated language in *6 AAC 80.010(b)* is still being used by some result-oriented advocates to argue that the ACMP requires *every* state permitting agency to perform redundant consistency reviews whenever they "authorize [a] use[]," even when they are not the coordinating agency. This arcane reading of *6 AAC 80.010(b)* was plainly precluded by the subsequent enactment of AS 44.19.145(a)(11) and AS 44.62.096. [5]/ For that reason, §80.010(b) should be updated to conform to existing statutes, and making this housekeeping change would be in the nature of a revisor's amendment. Moreover, such an amendment relates to the consistency review process, rather than substantive standards of the ACMP, and thus it needs to be addressed now, rather than in any subsequent review of 6 AAC 80.

Recent litigation has proven that, if DGC leaves even one section of its regulations, viewed in isolation, capable of being read to require multiple consistency reviews, someone will exploit that imprecise wording and run up private and public sector litigation costs (and threaten to cause serious project delays on the private sector). The purpose of this exercise is to clean up *6 AAC 50*, so that everyone understands it. To this end, the truism that only the coordinating agency performs a consistency review on any one project needs to be made clear at each occasion on which the issue arises, and, for that reason, Sealaska strongly recommends this additional clarifying language.

to 6 AAC 50.035(b)(1)-(2):

> *(b) DGC is the only state agency designated to*
> *(1) comment on, concur with, or object to a federal consistency determination or negative determination for a federal activity, whether or not the activity also requires a state agency authorization;*
> *(2) comment on, concur with, or object to an applicant consistency certification for a federal authorization or OCS plan, whether or not the plan or activity authorized also requires a state agency authorization;*

to 6 AAC 50.045(c):

> *(c) A resource agency shall only coordinate the consistency review and issue the consistency determination for a project that requires an authorization from only that agency and no federal authorization.*

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[5] / Sealaska and the Attorney General have both taken this position in the pending Department of Environmental Conservation adjudicatory proceeding involving the EPA general permits for Alaska log transfer facilities.

Creating Firm Deadlines for Consistency Reviews

The current draft is both front-end loaded and back-end loaded: it allows interminable delays at the beginning of the consistency review process, and then allows more potentially-interminable sequential delays once the process has begun.

First, Sealaska believes that the original intent of the 30- and 50-day review schedules was to complete all reviews within a 30-day period unless some resource agency's *statutes* required a more prolonged public review period. We urge DGC, and the resource agencies, to review the deadlines in the "C List" to make them consistent with that original goal. [6]/

Next, Sealaska would urge DGC to significantly tighten the review process in the regulations to remove, or at least constrain, the multiple opportunities for delay that have been built into the process. This would include these revisions:

- *6 AAC 50.225(a).* A determination as to whether an application is complete should be made within seven days of its submittal. The existing "as soon as practicable" deadline is vague and open-ended;

- *6 AAC 50.225(b).* The relationship between the current (b)(1) and (b)(3) is unclear. The two thresholds for beginning consistency review should be consolidated into a single requirement that commences consistency review as soon as:

  > *the packet sufficiently meets the requirements of 6 AAC 50.220 so as to allow commencement of review, even though additional information may be subsequently required.*

- *6 AAC 50.240(a).* The consistency review clock—"Day 1," as it were—should occur no more than three days after the application is determined to be complete. As written, the regulation gives DGC and the resource agencies the ability to postpone "Day 1" indefinitely. Particularly given the ample opportunities to delay the process once begun (*see below*), there is no justification for delaying the commencement of review, save the few days necessary to commence publication of public notice;

- *6 AAC 50.280.* In response to the private sector's concern that DGC's revamp of *6 AAC 50* was proposing even additional grounds for extending the consistency review period, DGC's response was to add yet two more bases for delaying the project (*6 AAC 50.280(a)(2) and*

[6] / Current 6 AAC 50.110(a) provides, in essence, that all reviews will be 50 days in length unless the resource agency's laws require 30-day issuance. This turns the original intent of the 30/50 day dichotomy on its head, and it needs to be changed.

(5)). The October Draft thus adds, in total, four new time extensions to the existing regulations (*6 AAC 50.280(2),(5),(8) and (11)*), and greatly expands the scope of existing delay provisions. [7]/ That can scarcely be called significant progress in the search for regulatory reform. Sealaska urges DGC to adopt an unyielding policy of, at the very least, creating no opportunity for delay that is longer or broader than under existing regulations.

Reasserting Coordinating Agency Authority.

When the Alaska Legislature enacted AS 44.19.145(a)(11), it intended to accomplish some regulatory reform of its own. It believed that only the Office of the Governor would have the power and will to compel individual resource agencies to cooperate and to complete their tasks quickly. Were it not for this aspect of the "coordinating agency," there would have been no need to confer that job on the Governor's Office—any existing resource agency could have done any needed passive "coordinating."

It is, for that reason, disappointing that some aspects of the draft seem inconsistent with the coordinating agency's intended role, including these:

- *6 AAC 50.245(c)* and *6 AAC 50.445(c).* Apparently, DGC will not screen requests for additional information if they come from a resource agency and are within that agency's area of expertise. If that resource agency requires the applicant to obtain a permit from that agency, it will have ample opportunity to make reasonable, lawful requests for further information in the course of that permit proceeding. Resource agencies, however, should not be allowed to use the ACMP program to impose additional requirements on applicants that are beyond that agency's existing regulatory powers. To prevent that from happening, DGC must act a filter to assure that any request for additional information is necessary *for ACMP purposes*. While DGC should, of course, give due deference to the requesting agency where appropriate, it should not abdicate the duties that the Alaska Legislature intended it to discharge;

- *6 AAC 50.255(c)*. The draft accurately describes the concept of "due deference" in 6 AAC 50.990(26), and *6 AAC 50.255(c)* now makes it explicit that resource agencies and districts will only be accorded "due deference" within their area of expertise or responsibility. Sealaska

[7] / For example, DGC or resource agencies may now indefinitely delay review whenever any "complex issue" arises, and not just "unusually complex issues," as in the existing regulations. *6 AAC 50.280(a)(7)*. Further, while, under existing regulations, only the director of the coordinating agency can impose such a delay, under the new draft, any staff can do it. This *carte blanche* change, in-and-of-itself, makes a sham of the review deadlines as a whole.

supports both of those changes. However, and despite this seemingly clear wording, resource agency staff often equate "due deference" with a veto. In fact, the concept only means that the coordinating agency must value the resource agency's opinion to the same extent that it would any qualified expert in the field. The Alaska Oil and Gas Association had proposed amending *6 AAC 50.255(c)* to caution that "the coordinating agency retains the authority to make the final determination as to whether or not the recommendation is necessary to achieve consistency under the ACMP and to accept, reject or revise that recommendation," and Sealaska supports that language. We do not agree, as DGC has suggested, that the new language in *6 AAC 50.260(b)* is an adequate surrogate for a clear statement on the limits of "due deference"; and

- *6 AAC 50.280(a)(3)*. After "additional information" is requested and received, it is the coordinating agency's responsibility (and not the "requesting agency's") to determine whether the information provided is adequate, giving due deference to its sister agencies when appropriate.

Requiring Review Participants and Commenters to Raise Issues in a Timely Manner

The regulations should provide that the unexcused failure to either: (a) propose an alternative measure; or (b) assert a ground for alleged inconsistency with the ACMP, constitutes a waiver of the claimant's right to later assert that measure or ground. This "exhaustion of administrative remedies" requirement should be imposed both on resource agencies and the public.

In prior responses to comments, DGC has offered two reasons for not imposing an exhaustion requirement. *First*, DGC notes that the right to file a petition under AS 46.40.100 is available to affected citizens only if they raised timely comments. And, in this regard, 6 *AAC 50.630(d)(3)(C)(i)* does an excellent job of confining petitions to consideration of comments timely made at earlier review stages, and Sealaska supports that regulation. However, the petition process applies only in limited circumstances (*i.e.*, when failure to fairly consider comments relating to noncompliance with a district coastal management program is alleged), and that process has no applicability to either resource agencies or to claims of noncompliance with the state ACMP standards.

Second, DGC argues that it is "legally difficult" to constrain the appeals in the manner you have suggested." In fact, it really isn't difficult at all. First, in dealing with the resource agencies themselves, the executive branch plainly has the power to establish rules of intra-agency conduct, and DGC itself has acknowledged that a so-called "Guidance Document" already imposes an "exhaustion" requirement on elevations. If a Guidance Document, then why not a regulation—particularly given the fact that, in Alaska, rules of general applicability that affect the public (as this rule surely does) *must* be published as regulations, and not as "Guidance Documents"?

Moreover, with respect to the public, it is common for administrative agencies to impose "exhaustion" requirements on anyone who would challenge that agency's decision. *See. e.g., 40 C.F.R. §§124.13* (requirement to timely raise claims during public comment period on EPA permits). Such a requirement is a matter of fundamental fairness to both the applicant and the permitting agency, and the latter has the inherent authority to adopt rules regulating conduct before the agency in a manner that promotes fair, timely and certain resolution of disputes.

To that end, Sealaska recommends changes to the following proposed regulations:

- *6 AAC 50.510*. Insert a new subsection to read:

  (f) The failure of any person, other than a review participant, to timely raise an issue during the public comment period constitutes a waiver of that person's right to raise that issue in any subsequent proceeding, unless the person demonstrates that the materiality or existence of the issue could not have been discovered at the earlier stage with the exercise of due diligence.

- *6 AAC 50.610(c)*. This subsection should be amended to provide that an elevation "*must be based solely on issues or proposed alternative measures that were raised by the review participant at each available review stage, unless the review participant demonstrates that the materiality or existence of the issue could not have been discovered at the earlier stage with the exercise of due diligence. However, new evidence in support of, or in opposition to, issues or alternative measures previously raised at each available prior review stage may be introduced at the elevation meeting by a resource agency, affected coastal district or the applicant.*"

Setting out the Procedures for Elevation

In practice, Sealaska's experience is that elevation meetings run smoothly and fairly. The core of these existing procedures should be included in the elevation regulation—*6 AAC 50.610.* To accomplish this; to make the section more clearly consistent with AS 46.40.096; and to add an optional procedure for applicants to bypass the director-level elevation in order to achieve more expeditious policy-level resolution of an applicant's elevation, we propose the following changes to §610 and to the definition of "director-level proposed consistency determination" in *6 AAC 50.990(22)*:

- Amend subsection (a) to read:

  (a) When a resource agency, project applicant, or affected coastal resource district does not concur with the proposed consistency

determination or response, it may request an elevation of the proposed consistency determination or response by the resource agency directors. When a project applicant requests an elevation, it may, at its election, bypass the director-level elevation under this subsection and file a commissioner-level elevation under (h) of this section. A request for commissioner-level elevation under this subsection must comply with (c) of this section.

- Amend subsection (e) to read:

(e) The coordinating agency shall invite the applicant and any affected coastal resource district, and may invite ~~another affected party to participate in the meeting arranged under (d) of this section~~other interested state or federal agencies.

- Amend subsection (f) to read:

(f) Only resource agency directors or their delegates may ~~make a~~participate in the coordinating agency's final decision on the elevation.

- Amend existing paragraph (g)(2) to read:

(2) prepare a director-level proposed consistency determination or response that ~~reflects~~ is consistent with the majority recommendation of the participating resource agency directors or their delegates ~~of the resource agencies' decision~~; and

- Add a new paragraph (2) to subsection (g) to read:

(2) hold an elevation meeting under informal procedures that the coordinating agency determines are best suited to a fair presentation of each review participant's and the applicant's positions on the elevation, given the nature of the particular controversy. The elevation meeting is open to the public; however, only the parties listed in AS 46.40.096(d)(3)(B) may participate at the meeting.

- Amend subsection (j) to read:

(j) Only resource agency commissioners or their delegates may ~~make~~ participate in the coordinating agency's ~~a~~ final decision.

- Amend paragraph (k)(1) to read:

(1) prepare a final consistency determination or response that ~~reflects the participating resource agency commissioners' or their delegates decision and that~~ is consistent with ~~any policy direction~~the majority

recommendation of ~~given by~~ the resource agency commissioners ~~of the resource agencies or~~ or any policy direction given by the governor; and

- Amend *6 AAC 50.990(22)* to read:

(22) "director-level proposed consistency determination" means a proposed consistency determination that reflects the majority recommendation of the participating resource agency directors or their delegates ~~of the resource agencies' decision~~ regarding the elevation;

Limiting the Re-Opening of Categorical or General Consistency Determinations

As drafted, *6 AAC 50.700(b)* severely limits the practical value of "categorical and general consistency determinations." For most major industries, an activity for which a categorical determination has been issued will be part of a larger project involving related activities for which a categorical determination has not been issued. Under current subsection (b), under this common scenario the categorical or general determination is, in essence, retracted, and the activity for which the determination was issued will undergo an individual consistency review. This self-defeating proviso serves no purpose, since: (a) the ACMP issues with respect to the categorically-consistent activity have already been resolved; while (b) any ACMP issues that arise with respect to other aspects of the project will still undergo individualized review.

As a result, Sealaska recommends that *6 AAC 50.700(b)* be amended as follows, and that *6 AAC 50.700(d)* then be deleted:

(b) When a project includes both an activity that requires an individual consistency review and an activity that is subject to a categorical or general consistency determination or general concurrence under this article, ~~all~~ only the activities ~~shall~~ for which a categorical or general consistency determination or general concurrence has not been issued will be included in the scope of a project subject to review ~~except as permitted under (d) of this section~~.

We do not agree with DGC that *6 AAC 50.720(c)* alleviates this problem (*see DGC Response to Comments, §700*). Indeed, the last clause of §720(c) merely restates the rule that, even if categorical determinations have been issued for most activities associated with a project, all those determinations are negated if even a single activity associated with the project "is not on the A or B list."

Just because this rule represents current practice doesn't justify its perpetuation—the whole point of this effort, we had thought, was to improve things.

Establishing a Petition Procedure for Adding Activities to the A-C Lists

Sealaska was disappointed to see that its proposed petition process for including activities on the A, B or C list was rejected. We understand that any person may, informally, request an amendment to any list. But the experience with the moribund inter-agency general permit for temporary camps makes it clear that, in the absence of:

- an obligation on DGC's part to respond to a petition; and
- standards for the acceptance or rejection of a petition,

the *ad hoc* ability to write letters isn't particularly helpful.

Other Sectional Comments

6 AAC 50.035(d). Amend to read:

> *(d) DGC shall develop, maintain, and update a coastal project questionnaire (CPQ). The CPQ shall solicit information regarding the project's description, site information, consistency with the enforceable policies of the ACMP, and necessary authorizations.*

Based on DGC's response to previous public comments, we believe the omission of the "enforceable policies" modifier was inadvertent.

6 AAC 50.055(d). Amend to read:

> *(d) An alternative measure identified in a final consistency determination as necessary for compliance with the district program and issued under 6 AAC 50.265 shall only be included in a local authorization issued by a coastal resource district exercising Title 29 authority.*

Again, given the history and complexity of these regulations, DGC should not miss any opportunity for greater clarity.

6 AAC 50.216(c)(7). Sealaska believes that consistency decisions can, and should, be made on the basis of the best then-available information. Suggesting that "studies" may be necessary for ACMP purposes would call into question the legitimacy of any consistency finding, since some additional "study" would always incrementally aid the decision-making process. We suggest that this paragraph refer to "mandatory information," rather than "mandatory studies."

6 AAC 50.220(a)(1). Sealaska still objects to the requirement, here and in corresponding sections, that applicants provide "comprehensive" and "detailed"

information. We believe that, once again, DGC has taken requirements applicable for federal purposes and inappropriately transposed them onto a state law that the Alaska Legislature intended to be more user-friendly. The regulations already provide that the information submitted with the application must be "sufficient to support the applicant's consistency determination," and, for state law purposes, that should be enough.

6 AAC 50.245(c). Amend to read:

(c) ~~The coordinating agency shall request from the applicant additional information relevant to the proposed project appropriate in the context of the requestor's expertise and area of responsibility. If a request for additional information is submitted to the coordinating agency that is outside the requestor's expertise or area of responsibility, the~~ The coordinating agency will consult with all review participants with expertise or responsibility, and with the applicant, to determine whether the requested information is necessary to evaluate the project's consistency with the enforceable policies of the ACMP that are material to the applicant's project. An applicant aggrieved by a request for additional information may elevate the request under the procedures of 6 AAC 50.610(b) within five days of receiving the request.

Requests for additional information may cause serious hardship on the applicant. The applicant needs to be part of the deliberative process, and it needs a remedy in the event that it believes that the request is excessive. Additionally, there should be some showing of *materiality* to the project under review before any additional information is sought.

Finally, these proposed changes are consistent with our comments, made *ante*, that it is the coordinating agency's responsibility to filter requests for additional information made under the ACMP.

6 AAC 50.245(e). Amend to read:

(e) The requestor shall notify the coordinating agency when the requested information is received. Within seven days after receiving the information, the requestor shall notify the coordinating agency whether it believes that the information is adequate to satisfy the original request. If the information is found to be inadequate to satisfy the original request,, the ~~requestor~~ coordinating agency shall

(1) explain how the information submitted is inadequate; and

(2) identify the information that is needed to satisfy the original request.

The regulations should prevent this process from becoming a vehicle to make *seriatim* requests for additional information. These proposed changes are

also consistent with our comments, made *ante*, that it is the coordinating agency's responsibility to filter requests for additional information made under the ACMP.

6 AAC 50.260(b). Amend to read:

> *(b) In developing a proposed consistency determination, the coordinating agency shall give careful consideration to all comments, and shall give a commenting resource agency and coastal resource district with an approved program due deference within that agency's or district's expertise or area of responsibility.* ~~*In developing a proposed consistency determination and any applicable alternative measures, the coordinating agency must evaluate the applicability of the enforceable policies to the proposed activity and decide how to afford due deference to the commentors.*~~ *The coordinating agency may consult with the applicant, with or without the participation of review participants or other persons, in developing a proposed consistency determination.*

The regulations should confirm that the current practice of consulting with the applicant *ex parte* during the development of the consistency determination is permissible.

We are suggesting deletion of the existing second sentence of this subsection. It has no clear meaning, and it is not responsive to the core issues involving "due deference" that we have discussed *ante*.

6 AAC 50.260(i). Amend to read:

> *(i)* ~~*The*~~ *Notwithstanding 6 AAC 50.270, the coordinating agency may immediately issue a final consistency determination if the review participants and applicant concur with the proposed consistency determination and all alternative measures determined to be necessary to ensure consistency with the enforceable policies of the ACMP, and no citizen eligible to petition under 6 AAC 50.620 submitted timely comments.*

We believe that this is DGC's intent. Without this change, there is a conflict in the cited regulations.

6 AAC 50.700(a). Amend to read:

> *(a) When an activity that is part of a project is authorized by a general or nationwide permit that was previously evaluated and found consistent with the ACMP, the activity subject to the general or nationwide permit* ~~*and completely describer therein*~~ *is consistent based on implementation of the general or nationwide permit. The scope of the project subject to review shall exclude the activity authorized by the general or nationwide*

permit.

The modifier "completely described therein" serves no apparent purpose (the activity covered by the general permit is self-evident), and its ambiguity would be a source of controversy and probably litigation. What, for example, does it mean to be "completely described" in a general permit—an instrument that, by definition, describes things only generally?

6 AAC 50.990. Amend the following definitions as follows:

- Delete the definitions of "activity" and "project." At present, neither adds anything to the understanding of the chapter. Moreover, by including substantive material in the definitions, DGC has strung together definitions that are inconsistent (and thus rather confusing). For example: (i) according to the definition, all "projects" are subject to the consistency process (§990(22)); while (ii)under the substantive regulations, only some "projects" are subject to the consistency process, depending on whether they affect coastal resources and are on the "C List" (§005(a)). To the same effect: (i) under §990(2), all "activities," by definition, may affect coastal resources; while (ii) section 750(a) implies that only a subset of "activities" may affect coastal resources.

- *(18) "cumulative impacts" means~~, for the purposes of 6 AAC 50.710 and 6 AAC 50.730~~, reasonably foreseeable incremental impacts of an individual project which, when viewed in connection with the effects of similar past projects and the effects of currently authorized similar projects, are likely to be both direct and significant;* **Explanation**: The definition should suffice for all purposes, not just the two cited. A materiality threshold is also necessary for this definition, though we agree that it is the cumulative impact of *all* similar projects, and not just the incremental impact, which needs to be "direct and significant." The "similar" modifier is necessary because the point of considering "cumulative" impacts is that *another* oil pad, or *another* logging road, might make the cumulative impact of oil and gas or timber development in the area significant. Conversely, one industry should not be penalized for local, regional or statewide impacts caused by unrelated and dissimilar industrial activity (it is not rational for a hospital to have its building permit denied because of mining activity in the same area).

- *(28) "enforceable policy" means a standard under 6 AAC 80, as amended, ~~and a policy in an approved coastal resource district coastal management program~~ that is legally binding, as developed under 6 AAC 85.090 and that has been expressly identified as an enforceable policy in an approved district coastal management program...* **Explanation:** There should be no ambiguity as to what constitutes an "enforceable policy" in a district program. Each "enforceable policy" should be tagged as such in the program and approved by the Coastal Policy Council for that purpose.

- *(29) "fairly considered" means, for the purpose of a petition to the council on a proposed consistency determination or response, ~~a proposed consistency determination or response by a coordinating agency that considers relevant factors in the consistency review and provides a reasoned determination or response that is responsive to timely submitted comments regarding consistency with an affected coastal resource district's approved program~~that the coordinating agency has reviewed the person's comment and has made at least a brief and reasoned response to that comment...***Explanation:** The "fairly considered" standard applies to the coordinating agency's treatment of specific comments, and not, as the current definition implies, to the consistency determination itself. The alternative definition offered is a legally-familiar one.

- *(32) "general permit" means an authorization for a specific category of uses of a generic application filed by a resource agency or federal agency on behalf of an entire category of potential users...* **Explanation:** Self-evident.

* * *

Sealaska Corporation appreciates the extraordinary effort that has been made, both at the policy and staff levels, to clarify and improve these immensely-important regulations. We remain hopeful that, in reviewing the comments that you will receive from our company and others, the Governor's Office will consider that the Alaska Legislature created this process for a reason. By vesting DGC with coordinating agency authority, the Legislature was trying to minimize private sector costs in dealing with multiple resource agencies, and it was hoping to create a short, predictable consistency review process that focused limited state resources on truly-significant coastal development. For the reasons we've explained in these comments, we feel that the October Draft is an iteration short of accomplishing those ends, and we look forward to working with DGC and the resource agencies in filling-in the missing pieces.

Sincerely,

SEALASKA CORPORATION

Richard P. Harris/jk

Richard Harris
Senior Vice President
Natural Resources

cc: The Honorable Pat Pourchot
The Honorable Michele Brown
The Honorable Frank Rue
Mr. Patrick Galvin
Alaska Forest Association
Alaska Miners Association
Southeast ANCSA Village Corporations
ANCSA Regional Corporations
Alaska Oil and Gas Association
Resource Development Council